No. 705

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CHARLES ELMORE CRO

Supreme Court of the United States

(OCTOBER TERM, A.D. 1945)

THE FEDERAL NATIONAL BANK, OF SHAWNEE, OKLAHOMA, a corporation, Guardian of the Estate of MINNIE O. CAMMACK, an incompetent person,
Petitioner,

VERSUS

NEW YORK LIFE INSURANCE COMPANY, a corporation,
Respondent.

PETITION FOR REHEARING

MARK GOODE,
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February, 1946.

UTTERBACK TYPESETTING CO., 13 S. Walker, Oklahoma City 4, Okla.

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NEW YORK LIFE INSURANCE COMPANY, a corporation,
Respondent.

PETITION FOR REHEARING

To the Honorable, the Justices of the Supreme Court of the United States:

Comes now the petitioner, The Federal National Bank, of Shawnee, Oklahoma, a corporation, Guardian of the Estate of Minnie O. Cammack, an incompetent person, and feeling aggrieved by the order of this Honorable Court rendered herein on the 4th day of February, 1946, denying the petition for writ of certiorari herein, respectfully requests this Court to vacate said order and to grant a rehearing and in support of this petition and its grounds therefor says:

I.

Petitioner seeks to have reviewed by this Court the decision of the Circuit Court of Appeals for the Tenth

Circuit reversing the judgment of the United States District Court for the Western District of Oklahoma rendered in favor of petitioner in a suit upon a life insurance policy; the policy being an Oklahoma contract (R. 27) and the jurisdiction of the United States Court resting exclusively upon diversity of citizenship (R. 2-3).

II.

The Circuit Court of Appeals held that delivery of the policy proceeds by the respondent Insurance Company to Fields, an ex-convict on parole (R. 92-93) named in a purported assignment bearing the signature of the aged insane insured (R. 28), Allen Cammack, found to be wholly without understanding of the nature and consequences of his acts at the time of the purported assignment (R. 28), constituted performance of the policy contract (R. 234) and exonerated the Company from liability to Minnie O. Cammack, elderly wife of the insane insured, the beneficiary named in the policy, also found to be mentally incompetent (R. 28-29), having been so adjudged by the State Courts of Oklahoma (R. 28).

III.

The Circuit Court of Appeals rested its decision upon the premise that an insurance company should not be required to pay a policy a "second time" saying: "There is no sound legal or moral reason why the Company should be compelled to pay the amount of this policy a second time" (R. 235). The soundness of the decision of the Circuit Court of Appeals depends upon whether the purported

assignment of the insane insured was only a voidable act, or a void contract, wholly void as to all persons acting thereon with or without notice. In holding that the respondent Insurance Company should not be compelled to pay the policy a "second time" the Circuit Court of Appeals, of necessity, found that payment had been made a first time to Fields, the purported assignee. There could be no question of payment a "second time" without payment a "first time." Delivery of the policy proceeds to the assignee of a forged assignment or to a stranger to the policy could not constitute payment under Oklahoma law. The Circuit Court of Appeals cited no Oklahoma authorities in support of its conclusion. Payment, under Oklahoma law, is the discharge of a contract by the performance of its terms.

—*Eastern Oil Company* v. *Smith*, 80 Okla. 207, 195 Pac. 773;

Continental Gin Co. v. *Arnold*, 52 Okla. 569, 153 Pac. 160;

U. S. F. & G. v. *Shull*, 169 Okla. 59, 36 Pac. (2d) 47.

There was no provision in the policy involved requiring or authorizing the respondent Insurance Company to pay the proceeds thereof to a stranger to the policy, the holder of a forged assignment, or the purported assignee of any assignment utterly void and having no legal effect. Consequently the Circuit Court of Appeals in rendering its decision was required to and did ascertain the nature, character and effect of an assignment made by an insane insured wholly without understanding.

IV.

Under Oklahoma law the contracts of an insane person, wholly without understanding, are on the same basis as forgeries and are wholly void as to all persons with or without notice and for all purposes, including *bona fide* purchasers. The United States District Court for the Western District of Oklahoma so found (R. 36). The applicable Oklahoma statute is Section 22, Title 15, Oklahoma Statutes Annotated, 1941, reading:

> "A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary to his support or the support of his family."

The decisions of the Oklahoma Supreme Court, the Court of last resort in Oklahoma, construing the statute are:

> *—Connecticut General Life Insurance Co.* v. *Cochran,* 95 Okla. 111, 218 Pac. 313;
>
> *Dozier* v. *Schuermann,* 175 Okla. 298, 52 Pac. (2d) 1063;
>
> *Harris* v. *International Land Co.,* 89 Okla. 163, 213 Pac. 845;
>
> *McMurtray* v. *McMurtray et al.,* 67 Okla. 50, 168 Pac. 422.

The statute makes no exception as to insurance contracts.

V.

The purported assignment was executed and delivered in Oklahoma and all questions concerning its validity, character and effect should have been determined by application

of Oklahoma law. The Circuit Court of Appeals treated all such questions however as matters of general law and must of necessity have decided that the purported assignment was not wholly void but was of sufficient validity to enable the respondent Insurance Company to discharge the obligation of its policy contract by delivery of the policy proceeds to Fields who without such purported assignment was and must remain a complete stranger to the policy contract. The Circuit Court of Appeals erroneously held that the purported assignment was merely a voidable act and not a wholly void contract.

VI.

In determining the validity of the assignment the Circuit Court of Appeals did not cite a single Oklahoma authority or statute but rested its conclusions entirely upon authorities from other jurisdictions where the contracts of an insane person are merely voidable and not void.

VII.

It is submitted that the primary question of the validity and effect of the purported assignment should have been determined by the Circuit Court of Appeals under Oklahoma law in accordance with the terms of the rule of decision statute, 28 USCA, Sec. 725, and the doctrine of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 118. By virtue of these authorities petitioner had a right to have the Circuit Court of Appeals determine the question of the validity and effect of the assignment in accordance with Oklahoma law applicable thereto. This, the Circuit Court

of Appeals has failed to do and this Court should protect the right of petitioner by granting certiorari and reversing the cause with directions to determine the Oklahoma law applicable to the questions involved herein as it has done on numerous occasions.

—*Rosenthal* v. *New York Life Ins. Co.*, 304 U. S. 263, 82 L. Ed. 1330;

New York Life Ins. Co. v. *Jackson*, 304 U. S. 261, 82 L. Ed. 1329;

Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290;

Griffin v. *McCoach*, 313 U. S. 498, 85 L. Ed. 1481;

Pecheur Lozenge Co. v. *National Candy Co.*, 315 U. S. 666, 86 L. Ed. 1103;

Huddleston v. *Dwyer*, 322 U. S. 232, 88 L. Ed. 1246.

VIII.

This Court has repeatedly granted certiorari because of the failure of Federal Courts to follow local law in diversity of citizenship cases; the questions raised by such failure being considered questions of public importance involving the relationship of State and Federal Courts.

See:

—*West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 85 L. Ed. 139;

Stoner v. *N. Y. Life Ins. Co.*, 311 U. S. 464, 85 L. Ed. 284;

Equitable Life Ins. Co. v. *Halsey, S. & Co.*, 312 U. S. 410, 85 L. Ed. 920;

Fidelity Union Trust Co. v. *Field*, 311 U. S. 169, 85 L. Ed. 109;

Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290;

Cities Service Oil Co. v. *Dunlap*, 308 U. S. 208, 84 L. Ed. 196.

Petitioner urges that the fact that the primary question of law upon which the soundness of the decision of the Circuit Court of Appeals rests, has erroneously been decided without reference to the controlling Oklahoma law applicable thereto, has been overlooked by this Court and that this Honorable Court should protect the right of petitioner to have such primary question of law determined in accordance with the rule of law prevailing in Oklahoma with respect thereto, by reversing this cause and requiring the Circuit Court of Appeals to render an opinion in harmony with Oklahoma law. Unless this Court will protect by appropriate action the right of a litigant in a diversity of citizenship cases to have a case decided by the Circuit Court of Appeals in accordance with the principles of local law applicable to the case, then the doctrine of *Erie R. R. Co.* v. *Tompkins*, is merely a declaration of abstract principle which the various Circuit Courts of Appeal may disregard at will, with impunity.

WHEREFORE, petitioner prays that it be granted a rehearing herein and that upon a rehearing this Court grant a writ of certiorari as prayed for and a decree of the Circuit Court of Appeals for the Tenth Circuit be reversed and

that petitioner have such other relief as to this Court may seem appropriate.

Respectfully submitted,
MARK GOODE,
American National Bank Bldg.,
Shawnee, Oklahoma,

Counsel for Petitioner.

Of Counsel:

JOHN L. GOODE,
American National Bank Bldg.,
Shawnee, Oklahoma.

February, 1946.

CERTIFICATE OF COUNSEL

Mark Goode, counsel for the petitioner, does hereby certify that the above and foregoing petition for rehearing is filed in good faith and with the belief that such petition is meritorious and should be considered by the Court, and further certifies that said petition for rehearing is not filed for purposes of delay.

Dated at Shawnee, Oklahoma, this 19th day of February, 1946.

MARK GOODE.